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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 722

LILLIAN H. WILLIS,
Petitioner,

against

CONSOLIDATED TEXTILE CO., INC. and MANUFACTURERS TRUST COMPANY,
Respondents.

In the Matter
of
CONSOLIDATED TEXTILE CORPORATION,
Debtor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, LILLIAN H. WILLIS, respectfully prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit, which in a *per curiam* opinion affirmed the order of the District Court for the Southern District of New York denying, not in its discretion, but as a matter of law, petitioner's motion for an order reopening the proceedings under Section 77 (b) of the Bankruptcy Act of the reorganization of the above named debtor so as to permit the petitioner to exchange bonds of the debtor for the

securities of the successor corporation two months after the expiration of the bar date fixed in the final decree in the reorganization proceedings.

A certified transcript of the record in the case, including the proceedings in said Court of Appeals, is furnished herewith in accordance with the rules of this Court.

STATEMENT

The petitioner is the holder and owner of three first mortgage bonds of the debtor having a total face value of $3,000. She acquired them in 1933 upon the death of her father who had bought them in 1928. Since 1933 the bonds lay in a safe deposit box owned jointly with her sister. During that time, they were forgotten and believed worthless by petitioner, except once in 1944 when she made inquiry about their value. At that time she was informed by a bank official that they were worthless. Upon the death of petitioner's sister in September 1948, the safe deposit box was opened at which time the bonds were again noticed by petitioner. She again made inquiry and tendered them in September 1948 to the successor corporation of the debtor in reorganization (ff. 9-12).

She was told by the respondent company that she was two (2) months late in presenting the bonds for exchange, and that all property represented by them was forfeited (ff. 9-12).

Since these bonds were bearer bonds, the petitioner did not receive any notice. Nor did she read of any notice or even know about the reorganization (f. 13).

The petitioner is a woman of forty-five years of age, without any business experience or training. She spent all her life taking care of the sick members of her family, and is now obliged to seek employment (f. 14).

By the terms of the plan of reorganization, one old bond could be exchanged for a bond of the successor company in the face amount of $500.00 and one hundred (100) shares of its capital stock. Thus, the petitioner would be entitled to bonds totaling $1,500.00 in face value and two hundred (200) shares of capital stock (f. 15). The estimated monetary value of petitioner's interest is about $6,000.

By order of the Bankruptcy Court on July 19, 1943, the Court fixed July 19, 1948 as the last date for the surrender of the debtor's securities by holders of them (ff. 64, 71).

The petitioner thereupon promptly on March 14, 1949, applied to the District Court for relief and appealed to the discretion of the Court to permit the exchange. The Court held that it had no power to grant the relief, upon the authority of *Duebler v. Sherneth Corporation,* 160 Fed. (2nd) 472 (C. A. 2) (f. 200). The petitioner appealed to the Court of Appeals with an argument to show that the new rules since the *Duebler* case furnish the authority for the exercise of the power to relieve petitioner. That Court on January 11, 1950, nevertheless, affirmed with a *per curiam* opinion on the authority of the *Duebler* case (page 70 record).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below, a Federal Court, should be reviewed, because it has decided a federal question of substance, not heretofore determined by this Court. This Court has never passed upon the serious and recurrent question in the administration of reorganization proceedings under 77 (b) of the Bankruptcy Act whether a District Court has power to reopen the proceedings for the sole purpose of enabling a security holder to exchange his securities for those of the successor company.

The contentions of petitioner that power resides in the District Court to exercise discretion is set forth in the annexed brief.

2. This Court has never passed upon the question whether under the circumstances stated a bondholder may not have the relief of a District Court in the exercise of its discretion or equitable powers. Although the Second Circuit and the Third Circuit Appellate Courts have held that even if the exercise of discretion is warranted, no power exists, nevertheless, this Court has not been called upon to give its final pronouncement on that doctrine.

3. This Court should review the decision below because of the unusual hardship created by the construction placed upon the statutes by the Courts below.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court for its review a full and complete transcript of the record and of all proceedings of the Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Court below be reversed, and that the petitioner be granted such other and further relief as may seem proper.

Dated: New York, February 2, 1950.

LILLIAN H. WILLIS,
Petitioner.

By EMANUEL REDFIELD,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The opinion of the Court of Appeals is not yet reported. It appears at page 70 of the record.

JURISDICTION

The jurisdiction of this Court is invoked under Sections 24(c) and 121 of the Bankruptcy Act and under Section 1254 sub. 1 of the Judicial Code. The date of the judgment of the Court below to be reviewed is January 11, 1950.

STATEMENT OF THE CASE

A statement of the case appears in the foregoing petition for the writ, and for the sake of brevity is here omitted.

ARGUMENT

POINT I.

Section 60 (b) federal rules of procedure and Section 2 subdivision a (8) empower the Court to exercise its discretion to reopen estates to enable security holders to exchange securities after the bar date of a closing order.

A preliminary observation of the facts of this case presents the problem whether the construction of the bankruptcy laws operate to create a forfeiture of the property of a bondholder in favor of the successor corporation of the debtor. In our society when a windfall is created by reason of abandonment of property, the windfall usually escheats to the people—to the public. Even in those cases

it is frequently provided that the money is deposited in the public treasury for a substantial term of years, ten or twenty, to await the claim of those who slept on their rights. Such instances are found in probate practice where heirs cannot be found, abandoned dormant bank accounts, insurance receipts, etc. The result that has followed from the decision of the bankruptcy court is that a debtor corporation who just had been rescued by the grace of our bankruptcy laws from a load of debt is now created the beneficiary of a windfall because the bondholder presented her securities two (2) months after the date mentioned in the bankruptcy order closing the estate.

The question is whether Sections 204 and 205 of the Bankruptcy Act are an absolute bar to the presentation of securities by a holder regardless of what excuse exists or what equities are in her favor, and whether Section 60 (b) of the Federal Rules of Procedure and Section 2 sub. (a)8 of the Bankruptcy Act apply.

Sections 204 and 205 of the Bankruptcy Act read as follows:

> "Sec. 204. Upon distribution, as provided in section 224 of this Act, the judge may, upon notice to all persons affected, fix a time, to expire not sooner than five years after the final decree closing the estate, within which, as provided in the plan or final decree—
>
> (1) the creditors, other than holders of securities, shall file, assign, transfer, or release their claims; and
>
> (2) the holders of securities shall present or surrender their securities. After such time no such claim or stock shall participate in the distribution under the plan.
>
> "Sec. 205. The securities or cash remaining unclaimed at the expiration of the time fixed as provided in section 204 of this Act, or of any extension thereof, shall become the property of the debtor or of the new

corporation acquiring the assets of the debtor under the plan, as the case may be, free and clear of any and all claims and interests."

Section 2, subdivision (a) 8, Bankruptcy Act, reads as follows: "The Courts of the United States hereinbefore defined as Courts of bankruptcy * * * are hereby invested * * * with such jurisdiction * * * *and to reopen estates for cause shown.*" (italics supplied)

Section 119 of the Bankruptcy Act provides that whenever the Court is required or permitted to fix a time for any purpose, the Court may extend such time.

Section 60 (b) provides:

"On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a Court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Section 57 of the Judicial Code, USC, Title 28, Section 118, or to set aside a judgment for fraud upon the

Court. Writs of *coram nobis, coram vobis, audita querela,* and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

Yet in *Tuffy v. Nichols,* 120 Fed. (2nd) 906, cert. denied 314 U. S., it was held that where unadministered assets are discovered a reopening of the estate was allowed two (2) years after the estate was closed. Those who argue that to reopen an estate is to upset administration are therefore met with this case which had no qualms about reopening when money came into the estate. There is an inconsistency if not an ironic injustice with a smirk in refusing a reopening when readjustment is sought in favor of a security holder, merely because it would upset things.

In *Grand Union Equipment Co. v. Lippner,* 167 F. (2nd) 958 (2nd C. C. A.), the question presented squarely whether Section 60-B was applicable to the bankruptcy proceedings. The Court said it was but only as to final orders (The order in the instant case is final). Said the Court at page 961:

"And the situation as to final orders is pretty thoroughly covered by the power granted, without qualification, to 'reopen estates for cause shown.' Sec. 2, sub. a(8), of the Bankruptcy Act, II U. S. C. A. section 11, sub. a(8). This power is exercised in the discretion of the Court for cause shown unless rights of third persons have intervened which would render such a course inequitable. *Wayne United Gas Co. v. Owens-Illinois Glass Co.,* 300 U. S. 131, 137, 57 S. Ct. 382, 81 L. Ed. 557; *Curtis v. O'Leary,* 8 Cir., 131 F. 2d 240, 245; *Standard Steel Works v. American Pipe & Steel Corp.,* 9 Cir., 111 F. 2d 1000; *Mohawk Realty Corp. v. Wise Shoe Stores, supra;* cf. *Duebler v. Sherneth Corp.,* 2 Cir., 160 F. 2d 472. The expiration of an extended period of time will not prevent a reopening for justifiable reasons. *Tuffy v. Nichols,* 2 Cir., 120 F. 2d 906, certiorari denied *Nichols v. Tuffy,* 314 U. S.

660, 62 S. Ct. 113, 86 L. Ed. 528; *Gerber v. Fruchter,* 2 Cir., 147 F. 2d 120; *Traub v. Marshall Field & Co.,* 5 Cir., 182 F. 622; *Milando v. Perrone, supra,* 2 Cir., 157 F. 2d 1002, 1003. Hence control of a bankruptcy court over its orders has been upheld generally without reference to this rule. See *Pfister v. Northern Illinois Finance Corp.,* 317 U. S. 144, 63 S. Ct. 133, 87 L. Ed. 146; *Bowman v. Loperena,* 311 U. S. 262, 61 S. Ct. 201, 85 L. Ed. 177; *Wayne United Gas Co. v. Owens-Illinois Glass Co., supra; In re Barnett,* 2 Cir., 124 F. 2d 1005, 1012, and cases cited by Moore and Oglebay, *supra.* These authorities are controlling here and we need not consider the possible applicability of the rule in other cases, such as those dealing with orders affecting third parties, or perhaps denying discharge. Cf. *Perlman v. 332 West Seventy-Second Street Co.,* 2 Cir., 127 F. 2d 716, 718, 719; *In re Loweree,* 2 Cir., 157 F. 2d 831, 834."

In *Duebler v. Sherneth Corp.,* (a prior case) 160 Fed. (2nd) 472, the same Court in a case similar to the one at bar held that Section 60-b was not applicable because its six months' time limit had been exceeded and also because Sections 204 and 205 provide an absolute statute of limitation for the presentation of securities, admitting of no exception.

As to the observation about the application of Section 60-b it should be noted that since the *Duebler* case was decided, Section 60-b was amended so as to provide by subdivision 6 that the Court may relieve a party for "any other reason justifying relief from the operation of the judgment."

This Court recently had occasion to apply it in the case of *Klapprott v. United States,* 93 Law Edition (Advance Sheet 6) 279. In that case the Court held that even after four years from the time of the entry of judgment denaturalization could be relieved from the judgment de-

naturalizing him. Under the facts there the District Court and the Circuit Court held that he was guilty of inexcusable neglect and therefore came within the time limitation provided for such cases in Section 60 (b). But this Court held (page 287) among other things, that subdivision 6 also applied and that petitioner's actions could not be merely neglect.

The same force must be applied to this case. Here the appellant cannot be charged with neglect. She had no knowledge of these proceedings or knowledge of the change in her securities. As Judge Bright put it in the *Duebler* case, "Applicants were, so far as the record shows, oblivious of the change in their securities." To be oblivious is quite different from being neglectful. To charge one with neglect or inadvertence we measure him with the yardstick of what a reasonable person would do under the circumstances, taking into consideration the modes, and the locale of the conduct.

Could the petitioner, a simple woman devoted to tending the sick members of her family who was told that her securities were worthless by a bank officer, be expected to follow up a corporate reorganization of which she had no knowledge because the bonds were bearer bonds? This is especially true when she had these bonds in a box for fifteen (15) years with the thought that they were worthless, as so many others during the depression period. Could we expect her to be diligent? Couldn't we rather expect her to let the bonds rest, forgotten by events? Is this negligence or obliviousness?

As Justice Black pointed out in the *Klapprott* case (page 288) the petitioner was sick, he was preoccupied with other matters, and without means to hire a lawyer. This was not neglect.

The facts in this proceeding are stronger than the *Klapprott* case because *Klapprott* at least was personally served with process. He had good reason to know of the action against that followed with the judgment against him. Mrs. Willis was utterly unaware of this proceeding. She held bearer bonds. She did not know about the proceeding, nor did she receive notice of it.

Therefore, her claim of obliviousness is stronger than *Klapprott*. Nevertheless *Klapprott* got relief.

See also to the effect that Section 60 (b) is applicable to proceedings to reopen a closed corporate reorganization:

Re: Lowerre, 157 Fed. (2) 831;
Perlman v. 322 West 72 St., 127 Fed. (2) 716.

General Order 37 provides that the Federal Rules of Practice shall be followed in bankruptcy, except where inconsistent with the Bankruptcy Act. Can it be said that Section 60 (b) is inconsistent with the Act? It is no more inconsistent with it than it would be with any other scheme of procedure culminating in a judgment or order. In all such cases Section 60 (b) would afford relief to the extent that the proceeding would be reopened. To say that a provision of practice enabling judgments to be reopened is inconsistent with the scheme of administration is to deny the wisdom of empowering a court to relieve for mistake, neglect, etc. Courts have come a long way from the day when a mistake or neglect was irreparable. The true statement is that Section 60 (b) is in perfect harmony with Sections 204 and 205 of the Bankruptcy Act. It affords relief when a judge in the exercise of discretion believes it should be exercised.

Even if it were granted that Sections 204 and 205 are a statutory scheme of limit, instances can be cited where

even in ordinary civil actions there are numerous exceptions to the operation of the limitation. The exceptions undoubtedly stem out of a desire to alleviate a hardship. Instances are; infancy, death of claimant, aliens affected by war, and sickness. These instances are to refute a contention that every limitation of time is absolute, without exception in favor of hardship. We urge that 204 and 205 must be read with 119 and Sect. 2 sub. a (8) and Sect. 60-b sub. 6. That Sections 204 and 205 are not absolute bar is indicated by the *Tuffy, Lowerre* and *Perlman* cases.

See also *Pfister v. Northern Illinois Finance Corp.*, 317 U. S. 144.

It is submitted, therefore, that the equities of this case favor the appellant and that on the law Section 60 (b) subdivision 6, Rules of Procedure, Sect. 2 sub. a (8) and Sect. 119 apply, and to that extent the *Duebler* case is overcome.

In the following cases the Court also held that relief is discretionary even after the proceedings were ended; *North American Car Corp. v. Peerless,* 143 Fed. (2nd) 938; *Kelby v. Prudence,* 140 Fed. (2nd) 185; *Mohawk Realty Co. v. Wise Shoe Stores,* 111 Fed. (2nd) 287.

POINT II.

There has been no prejudice to the debtor or its successor.

To meet respondents' contention that since July 19, 1948. several thousands of shares have been traded in the stock of the successor company first it should be noticed that the stock had been traded since July 19, 1948. Nothing is said as to how many shares were traded between that date and

September 27, 1948, when demand was made. Assuming, *arguendo,* that all shares alleged were traded during that period, nevertheless, there is no proof that any person buying such shares relied on the financial status of the company as of July 19, 1948. The statement of the respondent is not proof but sheer speculation. As between the petitioner, holder of these bonds who definitely is prejudiced, and a speculative prejudice the balance weighs heavily in her favor. To say that a person trading in the stock of the successor would be prejudiced marketwise by the granting of this application is to state a proposition contrary to the usual course of the purchase and sale of securities. People buy and sell securities on their market value of supply and demand and not because a few thousand dollars are to be redeemed.

Then again, who is to be favored, the person looking for a windfall by speculation or the person like petitioner whose savings (i. e., that of her father) are invested in these securities?

Were any weight given to respondents' contention in that respect it would mean that an application, such as this, involving a company whose shares are traded, could never be granted. In such cases it could always be asserted without proof that some purchaser of even one share an instant after the closing date would be prejudiced by a granting of the application.

The equities here, however, cannot be overlooked. They outweigh any speculative statements.

CONCLUSION

The petition for a Writ should be granted.

Dated New York, N. Y., March 21, 1950.

Respectfully submitted,

EMANUEL REDFIELD,

.....,

Attorney for Petitioner,
Lillian H. Willis.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION OF CONSOLIDATED TEXTILE CO., INC.

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BRIEF IN OPPOSITION OF CONSOLIDATED TEXTILE CO., INC.

Opinions Below.

The Opinion of the District Court (R. 200-201)* is unreported. The Opinion of the Court of Appeals (R. 70) is reported in 178 F.2d 924.

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* Record references are to folios numbered in the margins of pages.

Jurisdiction.

The judgment of the Court of Appeals was entered January 11, 1950. The petition for a writ of certiorari was filed March 30, 1950 and served April 4, 1950. The jurisdiction of this Court is invoked under Sections 24(c) and 121 of the Bankruptcy Act and Section 1254(1) of the Judicial Code, as amended by the Act of June 25, 1948.

Reasons for Denying Petition.

This case presents no important question of federal law meriting a review by this Court.

The Court below affirmed an order of the District Court denying petitioner's motion for an order reopening a 77B bankruptcy proceeding to permit petitioner to participate in a corporate reorganization after the expiration of the bar date (July 19, 1948) fixed by the final decree (R. 70), which was made July 19, 1943 and which finally closed the bankruptcy proceeding (R. 75). These rulings are strictly in accord with, and are plainly required by, the express provisions of Sections 204 and 205 of the Bankruptcy Act. Rule 60(b) of the Federal Rules of Civil Procedure, providing for relief from a final judgment for neglect or other cause, cannot avail the petitioner, since, under General Order 37, those rules apply only when not inconsistent with the Bankruptcy Act.

Jurisdiction to terminate and reopen reorganization proceedings is thus prescribed by the provisions of the Bankruptcy Act. There is no conflict among the Courts of Appeals or the District Courts in the interpretation of those provisions, and motions to reopen such proceedings only to permit participation in the plan after the bar date fixed in the final decree have, without exception, been denied.

Statutes Involved.

THE BANKRUPTCY ACT.

"Sec. 2. *Creation of Courts of Bankruptcy and Their Jurisdiction.*—a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under the Act, * * * to * * * (8) Close estates, by approving the final accounts and discharging the trustees, * * *; and reopen estates for cause shown; * * *."

"Sec. 119. Whenever under this chapter the court is required or permitted to fix a time for any purpose, the court may upon cause shown extend such time."

"Sec. 204. Upon distribution, as provided in section 224 of this Act, the judge may, upon notice to all persons affected, fix a time, to expire not sooner than five years after the final decree closing the estate, within which, as provided in the plan or final decree—(1) the creditors, other than holders of securities, shall file, assign, transfer, or release their claims; and (2) the holders of securities shall present or surrender their securities. After such time no such claim or stock shall participate in the distribution under the plan."

"Sec. 205. The securities or cash remaining unclaimed at the expiration of the time fixed as provided in section 204 of this Act, or of any extension thereof, shall become the property of the debtor or of the new corporation acquiring the assets of the debtor under the plan, as the case may be, free and clear of any and all claims and interests."

FEDERAL RULES OF CIVIL PROCEDURE.

"Rule 60.—Relief from Judgment or Order. (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. * * *"

Statement.

The Debtor's 77B petition was filed on December 13, 1935 (R. 26). Hearings were held before a Master, and an amended Plan of Reorganization (hereinafter called the "Plan", was proposed, which provided, *inter alia*, for the acquisition of the assets of the Debtor by respondent, Consolidated Textile Co., Inc. (hereinafter called the "Corporation") and that bonds of the Debtor could be exchanged for income debentures and stock of the Corporation (R. 26). The Plan was confirmed by decree of May 9, 1938 (R. 29). Thereafter it was consummated and the Debtor dissolved (R. 37). By order to show cause dated June 4, 1943, a hearing was called to be held for the purpose of making a final decree. The hearing was held on June 30, 1943 and on July 19, 1943 a final decree was made terminating these proceedings and finally closing the estate (R. 38-40).

The final decree determined that the notice of the hearing, given as required by the order to show cause, was good, timely and sufficient notice to all persons; and the applica-

tion of Sections 204 and 205 of Chapter X of the Bankruptcy Act to these proceedings was found to be practical. The decree fixed July 19, 1948 (five years thence) as the time within which the Debtor's bonds should be surrendered, and, in accordance with Sections 204 and 205 of the Bankruptcy Act, provided that after such date no bonds were to participate in the Plan and that the securities, cash and other property of the Debtor remaining unclaimed by bondholders on July 19, 1948 became the property of the Corporation free and clear (R. 64-75).

The petitioner endeavored to exchange her bonds in September 1948 and was then advised of the expiration of the bar date (R. 12). Thereafter, petitioner moved to reopen the bankruptcy proceedings stating that she had no actual notice of this proceeding and had been oblivious to her rights. It was not claimed that the Bankruptcy Court committed any error prior to or in making the final decree.

The order of the District Court denying the motion was made May 9, 1949 and affirmed by the Court of Appeals for the Second Circuit on January 11, 1950.

Argument.

The District Court did not specify whether or not this motion was denied as a matter of law or discretion. If the District Court denied the motion in its discretion, its decision would not be subject to review. There is ample evidence in the record that the petitioner was foreclosed from exchanging her bonds solely by her own neglect; that due notice was given of all proceedings and that the same were conducted in full compliance with the law; that these proceedings were commenced and conducted not in secrecy but with the normal amount of publicity; that a proper inquiry made at any time between the commencement of

these proceedings in 1935 and the expiration of the bar date in 1948 would have disclosed their nature and status and the rights of bondholders; and that, since the expiration of the bar date in 1948, the stock of the Corporation has been publicly traded in and the rights of third persons have thus intervened.

The petition to this Court, however, is based upon the assumption that the motion was denied, not in the discretion of the court, but as a matter of law, and the only question raised is whether the District Court has jurisdiction to reopen bankruptcy proceedings for the purpose of granting such a motion. The following argument, addressed to that question, necessarily proceeds on the same assumption.

1. The District Court Correctly Held That, Under the Provisions of the Bankruptcy Act, It Was Without Jurisdiction to Grant Petitioner's Motion.

The application of Sections 204 and 205 of the Bankruptcy Act was found to be practical, and, pursuant thereto, July 19, 1948 was fixed as the bar date upon which the rights of bondholders to participate under the Plan terminated (R. 70).

Section 204 of the Bankruptcy Act expressly provides that the court may fix a time, to expire not sooner than five years after the final decree, within which the holders must surrender securities and after which no claim may participate in the plan. Section 205 provides that the securities or cash remaining unclaimed after the bar date, shall become the absolute property of the debtor or its successor.

Despite these express provisions, petitioner contends that under Section 2, sub. a(8), and Section 119 of the Bankruptcy Act the Court had the power to grant the relief requested. The same contention, under almost identical

facts, was considered by the Court of Appeals for the Second Circuit in *Duebler* v. *Sherneth Corporation,* 160 F. 2d 472 (2 Cir. 1947) and rejected, the Court saying (Clark, J):

> "With such explicit statutory mandate it would seem clear that no discretionary power to disregard the bar provision or to set aside the final order remained in the court. This was the direct holding of the Third Circuit in the well-considered case of In re Peyton Realty Co., 3 Cir., 148 F. 2d 771, which was cited and followed in Knapp *v.* Detroit Leland Hotel Co., supra; and see also In re Sherland Bldg. Corporation, D. C. N. D. Ind., 29 F. Supp. 985; In re Tom Moore Distillery Co., D. C. W. D. Ky., 52 F. Supp. 938. Even in the absence of a closing order, we have refused a late application for an extension of time for the exchange of securities. North American Car Corporation *v.* Peerless Weighing & Vending Mach. Corporation, 2 Cir., 143 F. 2d 938, a case which illustrates not only the settled judicial reluctance to reopen estates once closed for further claims, but also the court's lack of continued jurisdicton over a reorganized corporation * * *" (p. 474).

With reference to the provisions of Section 2, sub. a(8), and Section 119, the Court said:

> "* * * The general provision for the reopening of bankrupt estates, §2, sub. a(8), 11 U. S. C. A. §11, sub. a(8), is not relevant, since reopening is not granted where the court has no power to grant the ultimate relief sought. Milando *v.* Perrone, 2 Cir., 157 F. 2d 1002. Sec. 119, 11 U. S. C. A. §519, granting power to the reorganization court for cause shown to extend the time which it is required or permitted to fix in the first instance, we think refers only to time periods before the ultimate closing of the estate. This seems to be made clear by §205, 11 U. S. C. A.

> §605, which provides that the securities remaining unclaimed at the expiration of the time fixed under §204, 'or of any extension thereof, shall become the property of the debtor or of the new corporation acquiring the assets of the debtor under the plan, as the case may be, free and clear of any and all claims and interests.' Hence time may be extended before the bar has fallen, and not afterwards'' (p. 474).

The rule, thus stated in the *Duebler* case, that the district court is without jurisdiction to reopen a reorganization proceeding to permit the exchange of securities after the bar date fixed in a final decree, has been consistently applied.

> In re *Peyton Realty Co.*, 148 F. 2d 771 (3 Cir. 1945);
> In re *Detroit Leland Hotel Co.*, 61 F. Supp. 686 (D. C. E. D. Mich. 1945), aff'd. 153 F. 2d 715;
> In re *Tom Moore Distillery Co.*, 52 F. Supp. 938 (D. C. W. D. Ky. 1943);
> In re *Sherland Bldg. Corporation*, 29 F. Supp. 985 (D. C. N. D. Ind. 1939).

Not one of the cases cited by petitioner in her brief supports her contention that the Court below had jurisdiction to reopen these proceedings for the purpose of extending the bar date. In *Tuffy* v. *Nichols*, 120 F. 2d 906 (2 Cir. 1941), cert. denied 314 U. S. 660, the estate of a deceased bankrupt was reopened to recover previously unadministered assets. No corporate reorganization, final decree, or bar date was involved. Nor are *North American Car Corp.* v. *Peerless W. & V. Mach. Corp.*, 143 F. 2d 938 (2 Cir. 1944); *Kelby* v. *Prudence Bonds Corporation*, 140 F. 2d 185 (2 Cir. 1944), and *Mohonk Realty Corporation* v. *Wise Shoe Stores*, 111 F. 2d 287 (2 Cir. 1940) (Petitioner's brief, page

12) in point. All three were decided by the Court of Appeals for the Second Circuit and cited by that Court in its opinion in the *Duebler* case. Relief was denied in each.

In the *North American Car Corp.* case, despite the absence of a closing order, a late application for an extension of time to permit the exchange of securities was denied. Neither *Kelby* v. *Prudence-Bonds Corporation* nor *Mohonk Realty Corporation* v. *Wise Shoe Stores* involved such an application.

In *Pfister* v. *Finance Corp.*, 317 U. S. 144 (1942), this Court considered whether Section 39(c) of the Bankruptcy Act limited the jurisdiction of the reviewing court to act, and held that there was only a limitation on the person aggrieved to file his petition as a matter of right. Mr. Justice Reed, delivering the opinion of the Court, stated that a conflict of the circuits on the question raised had impelled the granting of the writ.

The unanimity with which the rule in the *Duebler* case has been applied where the precise question has arisen belies petitioner's contention that under the Bankruptcy Act the district court had jurisdiction to grant her motion.

2. The District Court Correctly Held That Rule 60(b) of the Federal Rules of Civil Procedure Is Inapplicable.

Rule 60(b) provides that the court may relieve a party from a final judgment, order, or proceeding for specified reasons, including that of excusable neglect and, under subdivision 6, for any other reason justifying relief from the operation of the judgment. Petitioner contends that Rule 60(b) is applicable in bankruptcy and that, under subdivision 6 thereof, the Court below had jurisdiction to grant this motion.

Rule 60 was designed to provide relief from the inflexibility of the term rule which had theretofore limited the power of the district court to reconsider its final judgments. The term rule, however, had no application to the Bankruptcy Court, which sat continuously and had no terms. The background of Rule 60 thus suggests its inapplicability in bankruptcy.

In *Grand Union Equipment Co.* v. *Lippner*, 167 F. 2d 958 (2 Cir. 1948) (Petitioner's brief, page 8), the Court of Appeals for the Second Circuit recognized the suggestion that the inconsistency in the application of the rule to bankruptcy proceedings renders it inapplicable under General Order 37. The opinion in that case makes it clear that the control of the Bankruptcy Court over its orders has been generally upheld without reference to the Rule.

In any event, this petition does not raise the broad question of whether Rule 60(b) is generally applicable or inapplicable in bankruptcy. The petition itself states quite clearly that the precise question raised thereby is the power of the district court to reopen bankruptcy proceedings for the sole purpose of enabling the petitioner to exchange her bonds after the expiration of the bar date.

Rule 81(a)(1) of the Federal Rules of Civil Procedure provides that the Rules "do not apply to proceedings in bankruptcy * * * except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States." General Order 37, promulgated by this Court pursuant to Section 30 of the Bankruptcy Act, provides that the Federal Rules shall be followed in bankruptcy "in so far as they are not inconsistent with the Act." It follows inescapably that Rule 60(b) cannot confer upon the district court jurisdiction denied it by the Bankruptcy Act. Under that Act the district court has no power to reopen bankruptcy proceedings for the

purpose of extending the bar date fixed in a final decree. Rule 60(b) cannot confer upon the court that jurisdiction.

The cases cited by petitioner in her brief are not in point. In *Grand Union Equipment Co.* v. *Lippner, supra,* a creditor asked only to reduce a claim to judgment so as to enable it to bring an action on an insurance policy issued to the debtor, and requested that the court's final injunction against the commencement of actions be modified accordingly. The order of modification entered was limited to the prosecution of such action, and it expressly provided that no execution should issue against the assets of the debtor.

In neither In re *Lowerree,* 157 F. 2d 831 (2 Cir. 1946), nor *Perlman* v. *322 West Seventy-Second Street Co.,* 127 F. 2d 716 (2 Cir. 1942) was a corporate reorganization or a final decree involved. In each, relief was denied.

The case upon which the petitioner principally relies is *Klapprott* v. *United States,* 335 U. S. 601 (1949), modified 336 U. S. 942. In that case relief was sought from a judgment of denaturalization. Bankruptcy proceedings were not involved.

The provisions of the Bankruptcy Act authorize the Bankruptcy Court to prescribe the manner and method of giving notice, to confirm a plan of reorganization, to enter a final decree, and to bar the claims of creditors not presented within the time limited therefor. The application of Rule 60(b) to this motion would be totally inconsistent with the provisions of the Act. Rule 60(b) is therefore, under the provisions of General Order 37, inapplicable to the instant motion.

3. There Is No Basis for Granting a Writ of Certiorari in This Case.

The petition does not disclose that there is a federal question of substance which should be determined by this

Court. There is no apparent conflict between the circuits or even between the district courts with respect to the questions raised herein.

When the precise question has been raised, the courts have uniformly held that, under the Bankruptcy Act, the district court is without jurisdiction to reopen a reorganization proceeding to permit the exchange of securities after the expiration of the bar date fixed in a final decree. In view of the limitation placed on the application of the Federal Rules in Bankruptcy by General Order 37, Rule 60(b) is not to be construed as conferring upon the Court jurisdiction not conferred by the Bankruptcy Act.

Conclusion.

The Courts below correctly held that, under the Bankruptcy Act, there was no jurisdiction to grant petitioner's motion, and that Rule 60(b) of the Federal Rules of Civil Procedure was inapplicable.

Dated: May 2, 1950.

Respectfully submitted,

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